

1 HON. JOHN C. COUGHENOUR
2
3
4
5
6
7
8

9 **UNITED STATES DISTRICT COURT**
10 **FOR THE WESTERN DISTRICT OF WASHINGTON**
11 **AT SEATTLE**

12 WOLFIRE GAMES, LLC, SEAN COLVIN,
13 SUSANN DAVIS, DANIEL ESCOBAR,
14 WILLIAM HERBERT, RYAN LALLY, HOPE
15 MARCHIONDA, EVERETT STEPHENS,
16 individually and on behalf of all others
17 similarly situated,

18 Plaintiffs,

19 v.

20 VALVE CORPORATION,

21 Defendant.

22 Case No. 2:21-cv-00563-JCC

23 **PLAINTIFFS' LOCAL CIVIL RULE**
24 **7(g)(1) SURREPLY MOTION TO STRIKE**

25 **NOTED ON MOTION CALENDAR:**
26 **September 17, 2021**

1 **I. THIS COURT SHOULD STRIKE DEFENDANT'S NEW ARGUMENT**

2 Valve has violated the cardinal rule that “[n]ew material does not belong in a reply brief,”
 3 because the “use of new material in a reply brief transgresses against the canons of fair forensics.”
 4 *Ellingson v. Burlington N., Inc.*, 653 F.2d 1327, 1332 (9th Cir. 1981). To enforce this rule, courts in
 5 this district strike new arguments made for the first time on reply, which deprive the opposing party
 6 of the ability to respond. *Wild Fish Conservancy v. U.S. Envtl. Prot. Agency*, 331 F. Supp. 3d 1210,
 7 1219 n.3 (W.D. Wash. 2018) (“Conservancy objects to Cooke raising this argument for the first time
 8 on reply, which is appropriate grounds for this Court to strike it.”); *Friends of the E. Lake
 9 Sammamish Trail v. City of Sammamish*, 361 F. Supp. 2d 1260, 1272 n.8 (W.D. Wash. 2005)
 10 (granting surreply motion to strike where movant raised new argument for first time in reply).

11 In its opening brief in connection with this motion to compel arbitration, Valve argued in no
 12 uncertain terms that *this Court* should hold that the SSA’s arbitration agreement is valid and
 13 enforceable. Dkt. 35, Motion to Compel Arbitration (“Mot.”) at 8 (“The SSA’s Arbitration
 14 Agreement Is Valid and Enforceable...”). Valve noted that *this Court* had previously ruled (based
 15 on different arguments presented in that case) that the SSA’s arbitration agreement was not
 16 procedurally or substantively unconscionable, and asked *this Court* to rule the same in this case.
 17 Mot. at 9, *citing G.G. v. Valve Corp.*, 2017 WL 1210220, at *2–3 (W.D. Wash. Apr. 3, 2017)
 18 (resolving unconscionability challenges), *vacated*, 799 F. App’x 557 (9th Cir. 2020).

19 Valve did *not* argue in its opening motion that the SSA delegates questions of validity to the
 20 arbitrator. In the Motion’s only reference to delegation, Valve argued that the *separate* question of
 21 whether “the dispute falls within the scope of the SSA’s arbitration clause”—that is the question of
 22 “arbitrability”—is “delegated to the arbitrator.” Mot. at 11 (“The Ninth Circuit’s holding in *G.G.*
 23 that a valid arbitration agreement exists between Valve and Steam users satisfies the first
 24 requirement for enforcement [whether ‘a valid agreement to arbitrate exists.’]. Whether this dispute
 25 falls within the scope of the SSA’s arbitration agreement (the second requirement) is a question of
 26 arbitrability delegated to the arbitrator . . .”). That question of arbitrability is a different one from
 27 validity, as Valve acknowledges. *See id.*; *see also G.G.*, 2017 WL 1210220, at *2 (“The FAA
 28 requires courts to compel arbitration if (1) a valid agreement to arbitrate exists, and (2) the dispute

1 falls within the scope of that agreement.”) (emphasis added); *Loc. Joint Exec. Bd. v. Mirage Casino-*
 2 *Hotel, Inc.*, 911 F.3d 588, 597 (9th Cir. 2018) (arbitrability “concerns only whether the dispute falls
 3 within the scope of the parties’ arbitration agreement.”). Valve did not argue that the separate
 4 question of validity had been delegated. As noted, instead it asked *this Court* to rule on validity.

5 In opposing Valve’s motion, Plaintiffs established that the SSA is invalid and unenforceable
 6 because it would deny consumers the ability to seek and obtain the statutory relief available to them
 7 for Valve’s monopolization and unfair business practices. Dkt. 51, Pls. Opp. to Mot. to Compel Arb.
 8 (“Opp.”), at 5-17. Plaintiffs did not address the argument that the SSA delegates questions of validity
 9 and enforceability to the arbitrator, because Valve had not made that argument.

10 But on reply, Valve abandoned its original position that this Court should resolve validity
 11 and enforceability, and instead argued for the first time that “the parties’ arbitration agreement
 12 delegates questions of validity . . . to the arbitrator.” Reply at 1 (emphasis added), 2-4. Valve’s
 13 abrupt reversal is unfair because it denies Plaintiffs the opportunity to respond to this (meritless)
 14 delegation argument. Accordingly, this Court should strike Valve’s new delegation argument. *Wild*
 15 *Fish*, 331 F. Supp. 3d at 1219 n.3; *E. Lake Sammamish Trail*, 361 F. Supp. 2d at 1272 n.8.

16 In the alternative, Plaintiffs request leave to file a short submission showing that the parties
 17 did not clearly and unmistakably agree that challenges to validity and enforceability of the
 18 arbitration agreement were delegated to the arbitrator. *See, e.g.*, SSA § 11.D (“A court has exclusive
 19 authority to rule” that plaintiffs are able to pursue representative injunctive relief and/or
 20 representative antitrust claims) (emphasis added); *id.* § 12 (“in the event that any provision of this
 21 Agreement shall be held by an arbitrator, court, or other tribunal of competent jurisdiction to be
 22 illegal or unenforceable . . .”) (emphasis added); *see also Fleming v. Parnell*, 2013 WL 4511494,
 23 at *2 (W.D. Wash. Aug. 23, 2013) (granting motion for leave to file substantive surreply to address
 24 new arguments made in reply).

25 **II. CONCLUSION**

26 The Court should grant Plaintiffs’ motion to strike Defendant’s new argument raised for the
 27 first time on reply. In the alternative, Plaintiffs respectfully request leave to respond to the new
 28 delegation argument with a short submission on the merits.

1 DATED: September 22, 2021

2

3

By /s/ Alicia Cobb

4

Alicia Cobb, WSBA # 48685
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
1109 First Avenue, Suite 210
Seattle, WA 98101
Telephone: (206) 905-7000
Fax: (206) 905-7100
Email: aliciacobb@quinnemanuel.com

5

6

7

8

Steig D. Olson (*pro hac vice*)
David D. LeRay (*pro hac vice*)
Shane Seppinni (*pro hac vice*)
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Telephone: (212) 849-7000
Fax: (212) 849-2100
Email: steigolson@quinnemanuel.com

9

10

11

12

13

14

Adam B. Wolfson (*pro hac vice*)
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
865 South Figueroa Street, 10th Floor
Los Angeles, CA 90017-2543
Telephone: (213) 443-3000
Fax: (213) 443-3100
Email: adamwolfson@quinnemanuel.com

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Charles B. Stevens (*pro hac vice*)
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
50 California Street, 22nd Floor
San Francisco, CA 94111
Telephone: (415) 875-6600
Fax: (415) 875-6700
Email: charliestevens@quinnemanuel.com

29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
7010
7011
7012
7013
7014
7015
7016
7017
7018
7019
7020
7021
7022
7023
7024
7025
7026
7027
7028
7029
7030
7031
7032
7033
7034
7035
7036
7037
7038
7039
7040
7041
7042
7043
7044
7045
7046
7047
7048
7049
7050
7051
7052
7053
7054
7055
7056
7057
7058
7059
7060
7061
7062
7063
7064
7065
7066
7067
7068
7069
7070
7071
7072
7073
7074
7075
7076
7077
7078
7079
7080
7081
7082
7083
7084
7085
7086
7087
7088
7089
7090
7091
7092
7093
7094
7095
7096
7097
7098
7099
70100
70101
70102
70103
70104
70105
70106
70107
70108
70109
70110
70111
70112
70113
70114
70115
70116
70117
70118
70119
70120
70121
70122
70123
70124
70125
70126
70127
70128
70129
70130
70131
70132
70133
70134
70135
70136
70137
70138
70139
70140
70141
70142
70143
70144
70145
70146
70147
70148
70149
70150
70151
70152
70153
70154
70155
70156
70157
70158
70159
70160
70161
70162
70163
70164
70165
70166
70167
70168
70169
70170
70171
70172
70173
70174
70175
70176
70177
70178
70179
70180
70181
70182
70183
70184
70185
70186
70187
70188
70189
70190
70191
70192
70193
70194
70195
70196
70197
70198
70199
70200
70201
70202
70203
70204
70205
70206
70207
70208
70209
70210
70211
70212
70213
70214
70215
70216
70217
70218
70219
70220
70221
70222
70223
70224
70225
70226
70227
70228
70229
70230
70231
70232
70233
70234
70235
70236
70237
70238
70239
70240
70241
70242
70243
70244
70245
70246
70247
70248
70249
70250
70251
70252
70253
70254
70255
70256
70257
70258
70259
70260
70261
70262
70263
70264
70265
70266
70267
70268
70269
70270
70271
70272
70273
70274
70275
70276
70277
70278
70279
70280
70281
70282
70283
70284
70285
70286
70287
70288
70289
70290
70291
70292
70293
70294
70295
70296
70297
70298
70299
702100
702101
702102
702103
702104
702105
702106
702107
702108
702109
702110
702111
702112
702113
702114
702115
702116
702117
702118
702119
702120
702121
702122
702123
702124
702125
702126
702127
702128
702129
702130
702131
702132
702133
702134
702135
702136
702137
702138
702139
702140
702141
702142
702143
702144
702145
702146
702147
702148
702149
702150
702151
702152
702153
702154
702155
702156
702157
702158
702159
702160
702161
702162
702163
702164
702165
702166
702167
702168
702169
702170
702171
702172
702173
702174
702175
702176
702177
702178
702179
702180
702181
702182
702183
702184
702185
702186
702187
702188
702189
702190
702191
702192
702193
702194
702195
702196
702197
702198
702199
702200
702201
702202
702203
702204
702205
702206
702207
702208
702209
702210
702211
702212
702213
702214
702215
702216
702217
702218
702219
702220
702221
702222
702223
702224
702225
702226
702227
702228
702229
702230
702231
702232
702233
702234
702235
702236
702237
702238
702239
702240
702241
702242
702243
702244
702245
702246
702247
702248
702249
702250
702251
702252
702253
702254
702255
702256
702257
702258
702259
702260
702261
702262
702263
702264
702265
702266
702267
702268
702269
702270
702271
702272
702273
702274
702275
702276
702277
702278
702279
702280
702281
702282
702283
702284
702285
702286
702287
702288
702289
702290
702291
702292
702293
702294
702295
702296
702297
702298
702299
702300
702301
702302
702303
702304
702305
702306
702307
702308
702309
702310
702311
702312
702313
702314
702315
702316
702317
702318
702319
702320
702321
702322
702323
702324
702325
702326
702327
702328
702329
702330
702331
702332
702333
702334
702335
702336
702337
702338
702339
702340
702341
702342
702343
702344
702345
702346
702347
702348
702349
702350
702351
702352
702353
702354
702355
702356
702357
702358
702359
702360
702361
702362
702363
702364
702365
702366
702367
702368
702369
702370
702371
702372
702373
702374
702375
702376
702377
702378
702379
702380
702381
702382
702383
702384
702385
702386
702387
702388
702389
702390
702391
702392
702393
702394
702395
702396
702397
702398
702399
702400
702401
702402
702403
702404
702405
702406
702407
702408
702409
702410
702411
702412
702413
702414
702415
702416
702417
702418
702419
702420
702421
702422
702423
702424
702425
702426
702427
702428
702429
702430
702431
702432
702433
702434
702435
702436
702437
702438
702439
702440
702441
702442
702443
702444
702445
702446
702447
702448
702449
702450
702451
702452
702453
702454
702455
702456
702457
702458
702459
702460
702461
702462
702463
702464
702465
702466
702467
702468
702469
702470
702471
702472
702473
702474
702475
702476
702477
702478
702479
702480
702481
702482
702483
702484
702485
702486
702487
702488
702489
702490
702491
702492
702493
702494
702495
702496
702497
702498
702499
702500
702501
702502
702503
702504
702505
702506
702507
702508
702509
702510
702511
702512
702513
702514
702515
702516
702517
702518
702519
702520
702521
702522
702523
702524
702525
702526
702527
702528
702529
702530
702531
702532
702533
702534
702535
702536
702537
702538
702539
702540
702541
702542
702543
702544
702545
702546
702547
702548
702549
702550
702551
702552
702553
702554
702555
702556
702557
702558
702559
702560
702561
702562
702563
702564
702565
702566
702567
702568
702569
702570
702571
702572
702573
702574
702575
702576
702577
702578
702579
702580
702581
702582
702583
702584
702585
702586
702587
702588
702589
702590
702591
702592
702593
702594
702595
702596
702597
702598
702599
702600
702601
702602
702603
702604
702605
702606
702607
702608
702609
702610
702611
702612
702613
702614
702615
702616
702617
702618
702619
702620
702621
702622
702623
702624
702625
702626
702627
702628
702629
702630
702631
702632
702633
702634
702635
702636
702637
702638
702639
702640
702641
702642
702643
7026

1 David D. Golden (*pro hac vice*)
2 CONSTANTINE CANNON LLP
3 1001 Pennsylvania Avenue, NW, Suite 1300N
Washington, DC 20004
4 Telephone: (202) 204-3500
Fax: (202) 204-3501
Email: dgolden@constantinecannon.com

5 A. Owen Glist (*pro hac vice*)
6 Ankur Kapoor (*pro hac vice*)
7 Jeffrey I. Shinder (*pro hac vice*)
CONSTANTINE CANNON LLP
335 Madison Avenue, 9th Floor
New York, NY 10017
8 Telephone: (212) 350-2700
Fax: (212) 350-2701
9 Email: akapoor@constantinecannon.com

10

11

12

13

*Attorneys for Wolfire Games, LLC and the
class.*

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Thomas N. McCormick (*pro hac vice*)
VORYS, SATER, SEYMOUR AND PEASE LLP
4675 MacArthur Court
Suite 700
Newport Beach, CA 92660
Telephone: (949) 526-7903
Fax: (949) 526-7901
Email: tnmccormick@vorys.com

Kenneth J. Rubin (*pro hac vice*)
Timothy B. McGranor (*pro hac vice*)
Kara M. Mundy (*pro hac vice*)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, OH 43216-1008
Telephone: (614) 464-6350
Fax: (614) 719-6350
Email: kjrubin@vorys.com
tmcgranor@vorys.com
kmmundy@vorys.com

*Attorneys for Sean Colvin, Susann Davis, Daniel
Ryan Lally, Hope Marchionda, Everett Stephens,
and the class.*

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2021, I caused a true and correct copy of the foregoing to be filed in this Court's CM/ECF system, which sent notification of such filing to counsel of record.

DATED September 22, 2021

/s/ Alicia Cobb
Alicia Cobb, WSBA #48685